A Holistic Approach to Corporate Compliance and Dispute Management

by

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A HOLISTIC APPROACH TO CORPORATE COMPLIANCE AND DISPUTE MANAGEMENT*

Susan R. Chema and Steven A. Lauer**

I. Introduction

Litigation is a fact of life for every corporation. The management of disputes (including litigation) is one of the most important responsibilities of a corporate law department. Mismanagement of disputes can lead to excessive cost, adverse results (such as negative findings by juries or judges, overly costly settlements, and equitable remedies that impact business operations adversely), and business relationships that are needlessly destroyed.

In-house attorneys recognize the importance of preventing disputes from arising. The efforts by law departments to minimize the occurrence or likelihood of disputes — let's call those efforts "preventive" law or counseling — can include educational efforts, matter-specific counseling and product- or service-development contributions.

How can a law department effectively manage disputes so as to minimize adverse results and prevent similar disputes from occurring? The solution is a comprehensive, holistic approach to disputes. Such an approach brings to bear the multiple talents of both in-house and outside counsel and captures lessons learned from actual disputes to train employees and strengthen the business. Well-thought-out processes assure that appropriate tools are brought together to address disputes so as to resolve them in a manner that does not exacerbate the differences between the disputants.

Law departments of any size face the same issues and hurdles in managing disputes and litigation, though they differ, of course, in the internal and external resources that they can apply to the task. On account of its more limited resources, a small law department might need to rely on outside counsel to a greater degree than a department that has more inside attorneys and other support staff and services. A smoother relationship between inside and outside counsel, therefore, may be even more critical for a small law department than for its larger counterpart.

Whatever the law department's size, however, it should approach disputes consistently, applying an integrated approach from start to finish. Each element of a dispute prevention and management regimen should reinforce the other elements, rather than having the incentives or approach of one element undermine the efficacy of any other.

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What are the basic components of such a comprehensive, holistic dispute-management protocol? While there are many steps that might be included within that term, the basic elements are

- efforts to make the company more legally aware and compliant in respect of the law-related issues and liability-creating situations that the employees likely encounter in their day-to-day activities;
- a means of consistently and effectively assessing the merits of each dispute (relative to other disputes in which the company is embroiled as well as the instant dispute on its own) early;
- a consistent method by which to select and retain outside counsel;
- an approach to disputes and litigation that treats each one as a project to be managed using relevant planning and budgeting tools;
- deliberate staffing of the company's dispute-management team for each matter;
- corporate attitudes and approaches (what we call the "ethos" of the company) that increase the chances that disputes will be avoided and, if they occur, are addressed appropriately;
- the proper use and application of information related to disputes; and
- well-designed corporate policies that extract information about the company's experience in each dispute so as to allow continuous improvement of its business processes based on experience.

While this may seem a daunting list, it is not as imposing as it may appear.

All the elements of the dispute-management protocol must be similarly "calibrated." If one element is effective only if the company emphasizes settlement rather than "scorched earth" litigation but another element of the protocol does not reward reasonable litigation tactics and instead rewards a "no stone unturned" approach, the inconsistency will be counterproductive (not to mention expensive). The entire protocol must be holistic and designed to have mutually reinforcing processes.

II. Litigation Management before Litigation Exists

The perspective of the company on certain issues will constitute an important part of a dispute-management regime. In certain circumstances, that attitude might enable the company to avoid litigation in the first place, which represents the most effective means of keeping litigation costs down. In order to accomplish that goal, however, it is usually important that the attorneys constitute an integral part of the company's approach to business, and that legal issues are integrated into the activities of the nonlawyers in the company./1/ If you identify and address legal issues early in the business development cycle, you are more likely to avoid problems that might lead to disputes and litigation. Not all companies, however, are equally open to such involvement by the lawyers, inside or out.

Effective training of employees on substantive legal issues can very effectively contribute to the prevention of disputes. Integrity Interactive Corporation offers online compliance training courses on subjects such as antimoney laundering, antiharassment, the proper use of e-mail, and intellectual property, as examples. The more the employees understand the ways in which their day-to-day activities can intersect with legal rules, the better prepared they are to avoid such problems. From a dispute-management perspective, the subject of such training should also include company policies and procedures because inconsistent adherence to or application of those policies can lead to disputes with clients, customers, suppliers, and other business partners.

The company can deliver that training — the heart of a corporate compliance program/2/ — in a number of ways. In-person training can be most effective, particularly for the in-depth treatment of complex topics. Indeed, many law departments include that type of training in the services that they provide their in-house clients. In-person, face-to-face training, however, is very resource-intensive. When in-house attorneys are among the presenters of such training, the burden on the law department can be significant, especially if many employees in geographically dispersed locations require training.

Alternative training-delivery mechanisms exist. Computer-based training represents a much more cost-effective means of achieving consistent, trackable compliance training./3/ Such training can be delivered over the Internet, a corporate intranet, or by compact disc. Each method entails some administrative challenges and each offers some advantages. A combination of methods might best suit a particular company's situation. Each method may have particular strengths and weaknesses that you should consider when designing the compliance training for your organization./4/

An example of a training tool that is an integral component of a holistic dispute resolution process is the use of a "lessons learned/best practices" process. When legal disputes are resolved at NCR Corporation, for example, the law department attempts to capture the lessons learned from, or best practices associated with, each matter. This practice offers a mechanism for providing regular legal training to clients in the context of actual issues that the company faces today, and it is directed to those best positioned to learn from the case and to help the company avoid similar disputes in the future.

To summarize, a good training and compliance program comprises an important element of, or a perfect complement to, an effective dispute-management program. By ensuring greater compliance with both government-issued laws and regulations (the typical focus of a compliance program) and the company's own policies and procedures, you should increase your chances of preventing disputes from arising or from rising to the level of litigation. If, despite that program, your efforts fail to prevent them from reaching a formal stage, however, a good training and compliance program should provide you with valuable ammunition in your litigation-related efforts./5/

III. Litigation Management Once Litigation Exists

Once a case against the company is filed, you need to manage that dispute as efficiently and as effectively as you can in order to reach the best resolution possible. This aspect of dispute management calls for the application of the project management techniques that we referred to above.

The early and periodic assessment of disputes is necessary in order for the company to deal with each one appropriately. You cannot treat a "bet the company" antitrust inquiry from a government agency as you would a routine "slip and fall" case because the risks that they present are so different. Conversely, to treat every dispute as if it were a torpedo aimed directly at the company's main engine room would lead to excessive cost. Even putting aside those extreme examples, obviously not every dispute deserves the same response. Adjusting the response to the dispute, however, requires an early understanding of the significance of the matter. That significance can be measured in terms of possible adverse consequences if it were to go to a jury or in terms of the amount of effort needed to resolve it.

At NCR Corporation, the law department prepares litigation risk assessments for lawsuits and disputes at the commencement of each matter. These risk assessments serve a number of purposes: they identify the general level of exposure associated with the case, they facilitate attorney-client communications,

they identify factual issues the client may help address, and they assist in evaluating the return the company achieved in exchange for the fees spent to resolve the matter.

Determining whether outside counsel are needed to represent the company's interests in a particular dispute is one of the first decisions that in-house counsel must make when a dispute arises or appears imminent./6/ If in-house counsel has determined to retain outside counsel to represent the company, he or she must turn to the selection of appropriate counsel — the next major decision. This may also be the most important decision that in-house counsel must make in respect of the dispute, since the choice of counsel can have a significant impact on the likely outcome as well as the cost of that outcome./7/ There are a variety of methods by which to make that choice, each method having its own strengths and weaknesses./8/ The appropriateness of each method depends on the situation, so it is important to understand the strengths and weaknesses of those selection tools prior to selecting from among them.

A holistic dispute-management process will capture the results of past disputes to assist in the selection of outside counsel for new matters. For example, NCR's law department tracks outside counsel performance in selected areas, such as accuracy of budgeting and return on investment. Return on investment is derived by applying a ratio that compares the variation between the expected value of the case and the actual outcome with the amount spent to achieve that outcome. Armed with this information, the law department is well positioned to select the best performing lawyers to handle new cases and to identify outside counsel that are not achieving comparatively strong results. Before retaining a new counsel that has not previously represented the company, NCR's law department seeks to ensure that the prospective new counsel understands the company's requirements and is likely to meet them. This process provides a principled and effective structure for selecting, and maximizing the use of, the best performing outside counsel.

Once you have selected outside counsel, the retention letter is your first opportunity to provide outside counsel a comprehensive picture of the company's expectations *vis-à-vis* that representation. Through such a letter, you can lay the groundwork for a smooth, successful, client/counsel relationship. Moreover, in order to prepare a good retention letter, a law department needs to think through the work that it plans to assign to outside counsel as well as the ways in which inside and outside counsel will jointly represent the company in the course of that work. Some of the subjects that it should address in the letter are

(1) the scope of the representation;
(2) expectations regarding budgeting and assistance in the risk assessment process;
(3) the basis by which the fee will be calculated;
(4) the company's policy regarding conflicts of interest on the part of outside counsel;
(5) the extent of outside counsel's responsibility; and
(6) the client's and the firm's respective rights to terminate the relationship.

The department should convey to outside counsel very early in the representation the company's attitude toward disputes (*e.g.,* does it take a "not one cent in blood money" approach, or does it want counsel to assess every dispute's potential for settlement before plunging too far into the merits and details of the case), either in the retention letter or in guidance that it provides counsel at about that same time.

The difficulty of controlling the cost of litigation underscores the importance of creating an environment that is very conducive to efficiency and cost control. An effective way to do this is to apply some project management techniques to the task. Foremost among those techniques are budgeting and planning.

Those two disciplines can provide the information and means to exert control of a project (and litigation is a project, make no mistake). You must balance cost and thoroughness in managing litigation./9/

Staffing for litigation, as for any sizeable project, should be deliberate, not undisciplined. Having the appropriate law firm involved in your case is an important first step, but making sure that the appropriate individuals are handling the work is an often-overlooked part of the solution./10/ The larger and more involved the case, the more critically you must review the makeup of the team to assure that it includes the correct mix of talent and experience. Try to achieve consistency in staffing because turnover leads to greater cost and greater risk. When considering the roles of various individuals and organizations in managing litigation and representing the interests of the company, do not forget to integrate the business unit personnel into the team./11/

The existence of a dispute (whether or not it ripens into litigation) often means that the business could learn a lesson. Unfortunately, few companies have a programmatic method of extracting those lessons from their litigation or other disputes. From a total quality management perspective, however, a company should identify those lessons and incorporate them into improved business procedures so as to avoid repetitive errors. A systematic approach to doing so on each dispute, such as conducting a "post mortem," can provide very valuable benefits, as discussed above./12/

In order to manage disputes, you need information. You need information about each dispute as well as about all of them. A database that includes information about the entire range of disputes to which the company is a party is critical, particularly in order to identify trends or common issues that might otherwise escape notice. In constructing and implementing a database, however, take into account privilege issues so as not to create a valuable "road map" for other parties.

Law departments often use a great deal of legal research on important issues that arise in litigation and other matters. All too often, however, the substance of that research (which in some instances represents a considerable investment) is lost to future use once it enters corporate files. The capability of identifying the existence of useful research previously completed and paid for, and being able to retrieve that research from those files in a timely fashion, can be a very valuable asset.

Information that is unavailable to those who would be its immediate users does not qualify as useful information. For that reason, it is important to make information directly available to the "frontline" workers, whether they are outside or inside counsel. There are electronic tools available now for that purpose that did not exist just a few years ago./13/

A business executive is rumored to have remarked (perhaps apocryphally) that lawyers are the only group that can take an unlimited budget and exceed it. If that is the view of corporate management about legal budgets generally, it is even truer of litigation budgets and, within the context of litigation, of discovery efforts. Developing a consistent, centralized approach to discovery can save money and increase the chances of success considerably. Discovery can also be the cause of considerable adverse consequences, such as sanctions, if improperly done. Major corporations have been subjects of severe penalties for discovery lapses.

Think about adopting a more strategic approach to discovery. Especially for firms that face multiple lawsuits that raise similar issues or relate to similar information, approaching discovery on a multimatter basis offers cost savings as well as potential improvements in results. The possibility of inconsistent production of documents, including privileged documents, constitutes a real concern when the production

of those documents is managed only on a case-by-case basis by multiple law firms that handle those discrete cases for the same company. By assuming more control of the document production process, a law department might achieve lower costs for that process (less duplication of the same documents, fewer reviews of the same information for privilege and other issues, etc.) and less chance for embarrassing mistakes (or worse, such as charges of spoliation).

Each law department should expend effort to develop corporate policies in respect of some issues that, while not central to litigation management, are closely enough related as to have potential impact (positive and negative) on the costs or results of litigation. Among these are the bases on which the law department reports to management about its management of disputes, the scope of authority of the lawyers (inside and outside) in respect of strategic and tactical decisions, the division of responsibility for the legal service and associated tasks between inside and outside counsel, policies *vis-à-vis* early dispute resolution and alternative dispute resolution, and evaluation of outside counsel./14/

Another, often-forgotten exercise consists of the metrics by which a law department measures its progress in litigation./15/ The metrics should serve several purposes. First, they should dovetail with the reporting that the law department provides to senior management of the company. Second, they should provide the department an effective means to compare its results from year to year in order to identify trends in the company's dispute experience as well as the effectiveness of the department's efforts. Third, the metrics should correlate well with the expectations that the department has expressed to outside counsel *vis-à-vis* their performance for the company so as to enable the law department to provide them effective and useful evaluations and reviews.

IV. Summary

In-house counsel should view all disputes, whether or not they have ripened into litigation, as stages along a continuum in the parties' relationship. Do not forget to consider whether an ongoing business-to-business relationship constitutes a desirable and possible result despite the dispute or litigation. In any event, treat disputes as "litigation to be" and design your procedures to address them in that fashion. To the degree that you create a holistic approach to disputes, the company likely will be better off and better prepared to emerge with minimal damage to its business and its reputation.

What does all this mean? Dispute management encompasses more than litigation management. It even extends to an earlier point in time, prior to the existence of disputes, because dispute prevention is, in fact, the most effective form of dispute management. Compliance, including effective compliance training, represents a core element of such a program.

ENDNOTES

/1/ Dembiec, "Manage Your Case before It Starts," 35 *House Counsel* (Winter 1999).

/2/ "Training Is an Important Element of Any Ethics and Compliance Program." LaJoie & Lauer, "Business Ethics and Compliance — Establishing an Effective Program," Vol. 34 No. 3 *Law. Brief,* Feb. 15, 2004, at 2. This is consistent with the views of government officials. The Office of the Inspector General of the federal Department of Health and Human Services, for example, has indicated in guidance documents that "[a] critical element of an effective compliance program is a system of effective organization-wide training on compliance standards and procedures. In addition, there should be specific training on identified risk areas, such as claims development and submission, and marketing practices." See page 8 of "Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors," which is posted at <http://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf>.

/3/ Trackability of compliance training will serve a valuable role in light of the accountability of senior management and members of the board of directors for the effectiveness of a company's compliance program under the new standards established by the U.S. Sentencing Commission. *See,* for example, § 8B2.1(b)(2)(A) of the Sentencing Guidelines for Organizational Defendants (approved Apr. 8, 2004): "The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program." Data generated by an Internet-based training system can provide metrics that enable the members of the company's governing authority to be knowledgeable about the status of the compliance-training program and, thereby, exercise their oversight responsibilities.

/4/ The federal Occupational Safety and Health Administration believes that computer-based training cannot convey to employees necessary information about safety appliances as well as in-person training and hands-on exercises. *See,* for example, <www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21635>.

/5/ The relationship between a firm's compliance program and its litigation-risk profile highlights the need to broaden your perspective when analyzing staffing and other issues related to those two efforts, such as reporting relationships. While the entire range of issues that you should address is broad, your time devoted to exploring them will be well spent. *See* Lauer, "Think Strategically — Plan!" Vol. 19 No. 4 *Corp. Couns. Q.,* Oct. 2003, at 56.

/6/ Lauer, "The Evaluation of Cases is a Critical Element of Litigation Management," *In-House Practice & Management* (Altman Weil), Jan. 1999, at 9.

/7/ *See* Lauer, "What Is the Most Important Task of In-House Counsel?" Vol. 19 No. 2 *Corp. Couns. Q.,* Apr. 2003, at 73.

/8/ Lauer & Stock, "Make Your Selection of Counsel More Than a Beauty Contest," *Canadian Corp. Couns. Prac. Manual* (Dec. 1998), § 3.3.1.

/9/ *See* Lauer, "Litigation Planning and Budgeting — The Use of Task-Based Budgeting to Manage Litigation," *Law Dep't Mgmt. Adviser,* May 1, 2002, at 8.

/10/ Whether you subscribe to the approach that you "hire the lawyer" rather than the law firm or you select the firm first, you at least must take into account both when making your counsel selection.

/11/ *See* Lauer, "In-House Counsel, Executive Must Play Strong Role: To Win in Litigation, All Players Must Take the Field," Vol. 2 No. 8 *U.S. Bus. Litig.,* Mar. 1997, at 16.

/12/ A "post mortem" can constitute an important element of a total compliance program, which should include remedial steps by which to prevent a recurrence of the noncompliant event or act. The dispute-management "post mortem," therefore, offers an opportunity to combine the compliance and dispute-management regimes. Inasmuch as the Sentencing Commission's new changes to the Sentencing Guidelines require that an organization conduct periodic evaluations of its compliance program for that program to be effective, "post mortems" will also serve a very valuable purpose in that context as well.

/13/ Lauer, "Improving the Client/Firm Relationship with Technology," *Law Dep't Mgmt. Adviser,* Dec. 1, 1999, at 13.

/14/ *See* Lauer, "What Business Can Teach Law," *Legal Times,* Sept. 22, 1997, at 25; and Lauer, "What Is The Most Important Task of In-House Counsel?" Vol. 19 No. 2 *Corp. Couns. Q.,* Apr. 2003, at 73.

/15/ *See* Lauer, "Measuring the Value of Metrics," Vol. 16 No. 3 *Corp. Couns. Q.,* July 2000, at 50.

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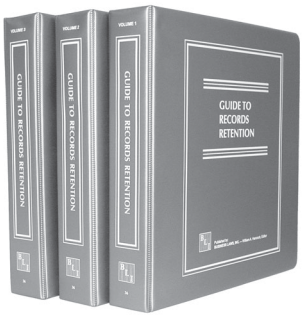

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